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Hearing On Liability and Financial Responsibility Issues Relating to Offshore Oil Production

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Mr. Chairman and Members of the Committee: the Congressional Research Service is pleased to assist the Committee with its deliberations as to the appropriate congressional response to the Deepwater Horizon oil spill in the Gulf of Mexico. I am an attorney with the American Law Division of CRS, where I specialize in environmental and Fifth Amendment takings law. This statement (1) gives a brief overview of the liability scheme in the Oil Pollution Act of 1990 (OPA); (2) discusses the constitutionality of S. 3305, which would retroactively raise the OPA liability cap for damages caused by oil spills from offshore facilities; and (3) discusses the constitutionality of S. 3346, which would raise the civil penalty cap under the Outer Continental Shelf Lands Act (OCSLA) retroactively and raise the criminal penalty cap therein apparently as of bill enactment.

Brief Overview of OPA Liability

OPA Title I serves to consolidate existing federal laws governing oil spill liability, expand their coverage, increase liability, strengthen federal response authority, and establish a fund to ensure that claims are paid up to a stated amount. 33 U.S.C. §§ 2701-2720. In its central provision, Title I states that each "responsible party" for a vessel or facility from which oil is discharged into or upon U.S. navigable waters, adjoining shorelines, or the exclusive economic zone is liable for the resulting "removal costs" and "damages." OPA § 1002(a). Removal costs are covered regardless of whether incurred by the United States, a State, an Indian tribe, or a private person. OPA § 1002(b)(1). Damages include those for natural resource injury (recoverable only by governments); real or personal property injury and resulting economic losses (recoverable only by the owner or lessee thereof); loss of subsistence use; governmental loss of revenues, as from net loss of taxes and royalties; loss of profits or impairment of earnings capacity (recoverable by any claimant, not just those who own oil-contaminated property); and the net costs of providing increased or additional public services during or after removal activities. OPA § 1002(b)(2).

The OPA liability scheme is a stringent one, modeled as it is after Clean Water Act section 311 and Comprehensive Environmental Response, Compensation, and Liability Act (Superfund Act) section 107. As with those statutes, OPA liability is strict, and joint and several, OPA § 1001(17) (incorporating the Clean Water Act liability standard), and is subject to but a handful of defenses. OPA § 1003(a)-(c). On the other hand, softening the liability scheme, the Act preserves the Clean Water Act liability caps in most cases (though raising them) and has been held to preclude punitive damages imposed under federal law. OPA § 1004(a); *South Port Marine, LLC v. Gulf Oil Limited Partnership*, 234 F.3d 58 (1st Cir. 2000). Of special interest in connection with the recent Gulf spill, the responsible party at an offshore facility (such as the British Petroleum wellhead) is subject to unlimited liability for removal costs, but is granted a cap of $75 million on

the above-listed categories of "damages." OPA § 1004(a)(3). This cap has remained unchanged since OPA's enactment twenty years ago.

Two other things should be said about this $75 million cap (and others in OPA). First, it applies per incident and per responsible party. It is not certain at this point that the Deepwater Horizon spill involves only one responsible party and only one incident, so there is a possibility the $75 million will be multiplied. Second, the liability cap (and others in OPA) is easily eliminated; if any of five exceptions apply, the cap is forfeited and liability for damages is without limit. This would be the case, for example, if the Gulf spill was found to be proximately caused by a responsible party's violation of an applicable federal safety, construction, or operating regulation. OPA § 1004(c)(1)(B).

Because oil from the Gulf spill may result in removal costs and damages in foreign nations, it should be mentioned as well that OPA contains many provisions providing for foreign claimants. For example, OPA allows claims against responsible parties by foreign governments for natural resource damages, at least where the Secretary of State has certified that the foreign government provides a comparable remedy for U.S. claimants. OPA §§ 1006(a)(4), 1007(a)(1)(B).

Finally, OPA liabilities for removal costs and damages should be kept in context, as they do not exhaust the potential liabilities of parties connected to the Deepwater Horizon spill. For example, Clean Water Act section 311, 33 U.S.C. § 1251, imposes civil and criminal penalties for oil spills, and the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1350(b)-(c), contains civil and criminal penalties for, among other things, violation of OCS lease terms or the Act and its regulations. In addition, the OCSLA extends the laws of the United States, and the law of the "adjacent state" where not inconsistent with federal law, to the OCS. 43 U.S.C. § 1333(a). Thus, for example, there could conceivably be civil or criminal violations of the Endangered Species Act, Marine Mammal Protection Act, or Migratory Bird Treaty Act in connection with the Gulf spill. The Solid Waste Disposal Act, 42 U.S.C. § 6901 et seq., also may apply. *See* OPA § 1018(a)(2). Finally, OPA specifies that state law "imposing any additional liability or requirements with respect to the discharge of oil or other pollution by oil within such State" is not preempted. OPA § 1018(a)(1); *see also* § 1018(c).

Constitutionality of S. 3305's Retroactive Increase in the Offshore-Facility Liability Cap for Damages

S. 3305, titled the Big Oil Bailout Prevention Liability Act of 2010, would raise the liability limit in OPA section 1004(a)(3) for damages caused by oil spills from offshore facilities. It does so by simply striking the $75 million figure in that provision and replacing it with $10 billion, thus preserving the exceptions that, if applicable, eliminate the cap. More to the point, S. 3305 states that it would take effect April 15, 2010, so it is plainly retroactive. It may be noted, however, that even in the absence of a pre-enactment effective date, S. 3305 could be said to have some degree of retroactivity. Even if a responsible party's payments over the current $75 million cap all go toward damages occurring after the bill is enacted, those damages stem from a pre-enactment incident and thus satisfy a common definition of retroactivity. And even were it limited to post-enactment spills, S. 3305 could be said to be retroactive in some measure if those spills occur at locations under pre-enactment leases.

The retroactive nature of the cap increase invites examination of five constitutional provisions. As discussed below, claims based on three of these – the Takings Clause, Substantive Due Process, and Bill of Attainder Clause – appear to have at best a modest chance of success, while claims under two others – the Impairment of Contracts Clause and Ex Post Facto Clause -- seem

to have almost no chance of success. It must be stressed, however, that how the legislative history of an enacted law characterizes the predecessor bill – especially whether a broad and legitimate public purpose for the bill is convincingly set forth – may affect the analysis, especially with regard to the Bill of Attainder Clause. That legislative history, of course, does not yet exist. Further, prediction of how courts will rule when applying the broadly worded tests of constitutional law is always uncertain. Finally, based on the limited prospects of constitutional claims, the retroactive increase is more likely to be litigated, if at all, as a possible breach of British Petroleum's lease contract, an issue this testimony does not reach.

Introduction. The Constitution disfavors retroactivity. At least five constitutional provisions, noted above, embody the notion that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not lightly be disrupted." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). Nonetheless, each of these five provisions has its special concerns and is of "limited scope," *id*. at 267, recognizing that within reasonable bounds, the retroactive application of statutes can be an acceptable and unavoidable means of achieving a legitimate public purpose. As the Supreme Court has said –

> Retroactivity provisions often serve entirely benign and legitimate purposes, whether *to respond to emergencies*, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply *to give comprehensive effect to a new law Congress considers salutary*.

Id. at 267-268 (emphases added). Accordingly, several Supreme Court decisions in the past half-century to address retroactive federal statutes have found them constitutionally inoffensive.

1. Takings Clause. A taking claim, to succeed, requires that the interest alleged to be taken is recognized as "property" by the Takings Clause. Moreover, how the analysis proceeds may depend on the type of property. Based on a limited understanding of the facts surrounding the Deepwater Horizon situation, CRS supposes that at least three interests may be implicated.

First, there is an interest in the law remaining unchanged. In the substantive due process context, this interest has long been held not to constitute a vested property interest: "No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *New York Central RR Co. v. White*, 243 U.S. 188, 198 (1917). More recently, takings decisions have adopted the same proposition. *See, e.g., Branch v. United States*, 69 F.3d 1571, 1577-1578 (Fed. Cir. 1995). Thus, the bare fact that S. 3305 would change the law existing when an offshore lease was entered into is not, of itself, a basis for a taking claim.

Second, OPA responsible parties have an interest in any money paid for damages in excess of the current OPA liability cap. Money is held to be property under the Takings Clause. *Philips v. Washington Legal Found.*, 524 U.S. 156 (1998). Thus, an OPA responsible party would be able to argue, under the canonical *Penn Central* test for regulatory takings, 438 U.S. 104, 124 (1978), that S. 3305 effects a taking of its disbursements to cover damages beyond the existing liability cap. Under the *Penn Central* test, used by the Supreme Court for takings challenges to retroactive monetary liability, a court must examine (1) the economic impact of the government action, (2) the degree to which it interferes with reasonable, distinct investment-backed expectations, and (3) the "character" of the government action.

Each of these *Penn Central* factors may pose an obstacle for a taking claim based on the retroactively increased monetary liability in S. 3305. As for the economic impact factor, the *Penn Central* test requires that the impact be very substantial, if not severe, before this factor weighs in favor of a taking. In one case, the Supreme Court held that a retroactively imposed monetary liability amounting to 46% of shareholder equity, combined with the "proportionality" of that impact with plaintiff's conduct, was insufficient to count the economic impact factor as favoring a taking. *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602,

645 (1993). Thus, based on reports as to the net worth or market capitalization of British Petroleum, the potential additional liability under S. 3305 – that is, the difference between $75 million and $10 billion – is likely to fall short of the *Penn Central* threshold, though it may not fall short as to other, smaller responsible parties (in this or future oil spills from offshore facilities).

The interference with reasonable investment-backed expectations factor often involves courts in a review of the legal landscape at the time the property interest alleged to be taken was acquired, with a view toward gauging the reasonableness of the buyer's expectations of economically exploiting that property interest. Oil and gas operations on the Outer Continental Shelf have been heavily regulated under OCSLA since the 1950s. Moreover, by 2008 when British Petroleum entered into the lease at issue here, federal oil spill liability limits had been increased, some twice and some by multiples approaching the 133-fold increase (from $75 million to $10 billion) S. 3305 would effect. As the Supreme Court said in addressing a taking challenge to retroactive monetary liability, "[t]hose who do business in the regulated field cannot object if the regulatory scheme is buttressed by subsequent amendments to achieve the legislative end." *Concrete Pipe*, 508 U.S. at 645, *quoting FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958). The Court noted further –

> Because legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations ... even though the effect of the legislation is to impose a new duty or liability based on past acts, Concrete Pipe's reliance on [the statute in question's] original limitation of contingent liability to 30% of net worth is misplaced, *there being no reasonable basis to expect that the legislative ceiling would never be lifted*.

508 U.S. at 646 (emphasis added; footnotes and quotation marks deleted). Thus, a company entering into an OCS lease in recent decades faces an uphill climb in arguing that S. 3305's increase in the liability cap interferes with its reasonable expectations.

As much a barrier as the first two *Penn Central* factors may be to a taking challenge to S. 3305, it is the third factor, the character of the government action, that most likely will prove fatal. Broadly speaking, courts are less inclined to find a taking when the challenged government conduct merely adjusts the benefits and burdens of economic life, as does S. 3305, than when it physically invades property. More pointedly here, courts have adopted the "generalized monetary liability" principle, which demands that to be a taking, the government conduct must target *specific* property. The principle was first put forward by the concurring justice and four dissenters in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) – that is, by a majority of the Supreme Court. Thus, a taking claim may arise when government appropriates money from a specifically identified fund of money (such as interest on an interpleader fund). But a statute imposing a generalized monetary liability – e.g., that A pay B out of unspecified funds – is not a taking. All lower courts that have addressed this point since *Eastern Enterprises* have endorsed the generalized monetary liability rule. *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338-40 (Fed. Cir. 2001) (en banc); *Swisher International, Inc. v. Schafer*, 550 F.3d 1046 (11th Cir. 2008), *cert. denied*, 130 S. Ct. 71 (2009); *Empress Casino Joliet Corp. v. Giannoulias*, 896 N.E.2d 277 (Ill. 2008), *cert. denied*, 129 S. Ct. 2764 (2009). In light of the principle, it is unlikely that S. 3305's increase in the OPA liability cap for offshore facilities – an increase in generalized monetary liability – would be regarded as a taking.

Eastern Enterprises should be factually distinguished, however. There, a four-justice plurality of the Supreme Court did indeed hold a federal statute's retroactivity to effect a taking, explaining that the statute imposed severe retroactive liability (attaching new liabilities to events that occurred decades earlier) on a limited class of parties that could not have anticipated the liability, and that the extent of liability was substantially disproportionate to the company's experience in

the affected field. These factual elements found by the plurality to be constitutionally offensive, at least in the aggregate, seem a far cry from the retroactivity of S. 3305. As applied to the Deepwater Horizon spill, S. 3305 needs to reach back only a short time (to April 20, 2010). Moreover, an increase in the liability limit could have been anticipated given Congress' already noted history of liability cap increases in the oil spill area. Finally, the extent of liability imposed by S. 3305 is "proportionate to the company's experience," since the added liability would be only for damages stemming from a company's own oil spills. Of course, the precedent value of *Eastern Enterprises* is further undercut by the fact that only a minority of the justices supported the takings analysis of the statute's retroactivity.

Note that both before and after *Eastern Enterprises*, every court to address the matter has rejected takings (and substantive due process) challenges to the Superfund Act, whose heightening of pre-existing liability standards, extending to pre-enactment releases of hazardous substances, offers some parallel to that of S. 3305. *See, e.g., United States v. Alcan Aluminum Corp*., 315 F.3d 179, 189-190 (2d Cir. 2003) (collecting cases).

As a third interest that could be asserted in a taking claim, British Petroleum might allege a right under its OCS lease not to be subject to laws enacted after the lease was signed. Leases are in the nature of contracts, and contract rights generally are held to be property under the Takings Clause. *See, e.g., Lynch v. United States*, 292 U.S. 571, 579 (1934). That being so, British Petroleum might argue that S. 3305 is essentially an abrogation – a taking – by Congress of a contract/lease term to which the United States had agreed. Such an argument would focus on the clause in the company's lease stating that "The lease is issued subject to [the Outer Continental Shelf Lands Act, existing regulations thereunder, and certain future regulations thereunder] and all other applicable statutes and regulations." The company might contend that "all other applicable statutes" refers solely to statutes existing when the company entered into its lease – not those, such as S. 3305, enacted later on. There is solid Supreme Court support for this interpretation: in 2000, the Court interpreted the same "catchall" language in another Outer Continental Shelf lease to "include only statutes and regulations already existing at the time of the contract …." *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 616 (2000). The argument would conclude that "all other applicable statutes" embraces the current $75 million cap in OPA, which S. 3305 abrogates.

Important here, however, is the consistent preference of the U.S. Court of Federal Claims and its appellate court, the Federal Circuit, for addressing disputes revolving around written contracts with the United States under a breach of contract, rather than a takings, theory. *See, e.g., Hughes Communications Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001) ("[t]akings claims rarely arise under government contracts, because the government acts in its commercial or proprietary capacity …."); *Castle v. United States*, 301 F.3d 1328, 1342 (Fed. Cir. 2002) (nothing is taken in the constitutional sense when the plaintiff, as is typical, retains the full range of breach of contract remedies). At least two challenges to congressional enactments as anticipatory breaches of pre-enactment OCSLA leases are in the reported case law. *Mobil Oil*, *supra*; *Amber Resources Co. v. United States*, 538 F.3d 1358 (Fed. Cir. 2008). As noted at the outset, this testimony does not reach any breach of contract issues raised by S. 3305.

2. Substantive due process. The Due Process Clause of the Fifth Amendment has long been read to demand not only procedural due process, but *substantive* due process as well. Substantive due process in the realm of economic legislation – the realm of S. 3305 – imposes only a very lax, highly deferential standard: that there exists a plausible rational basis which the legislative body could have had in mind linking the means chosen and the legitimate public purpose sought to be achieved. In a leading retroactivity/substantive due process decision, the Court explained –

> To be sure, insofar as the [Act being challenged] requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some

> retrospective effect. …. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. …. *This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.*

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15-16 (1976) (emphasis added). The Court did caution that "[t]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Id.* at 17. But that burden, said the Court in a later decision, "is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co*., 467 U.S. 717, 730 (1984).

It would seem that the retroactive application of the increased liability limit in S. 3305 back to the April 20 spill satisfies this test. Congress reasonably could suppose that for the foreseeable future, most of the exceedance of the current OPA liability cap would derive from this one huge spill. To exclude that spill from the bill's cap increase would compromise substantially the (assumed) public purpose of S. 3305 to lay a greater portion of economic damages per oil spill at the feet of the responsible party. Similarly, not applying S. 3305 to other existing leases (that is, confining it to leases entered into post-enactment) would greatly undercut the effectuation of that public purpose.

As noted in the takings discussion above, all substantive due process challenges to the retroactive liability scheme in the Superfund Act have been unsuccessful.

In sum, the sounder argument is that the retroactive application of the $10 billion liability cap in S. 3305 does not offend substantive due process.

3. Bill of Attainder Clause. The Constitution's Bill of Attainder Clause bars enactments that effectively declare the guilt of, and impose punishment on, an identifiable individual or entity, without a judicial trial. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977). Such enactments are seen to usurp the judicial function, thereby offending separation of powers and due process. As pertinent here, the argument might be that S. 3305, by reaching back to April 15, 2010, departs from the usual prospective-only application of enactments solely to bring in one particular oil spill: the Deepwater Horizon incident. This narrow-focus retroactivity, the argument might conclude, betrays an underlying intent to punish parties responsible for that incident. Then, too, the punishments that may be found constitutionally offensive are "not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct." *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 851-852 (1984). Thus, one can imagine an argument that S. 3305 would punish existing offshore facilities generally.

In *Nixon*, the Court indicated that to offend the Bill of Attainder Clause, the law must (1) single out a specific person or class and (2) be punitive. The Court then listed several indicators that a federal law is punitive. The law may impose punishment traditionally judged to be prohibited by the Clause. The law may not be rationally describable as furthering a nonpunitive legislative purpose. And the legislative history may evince a congressional intent to punish. A statute need not satisfy all these factors; rather, a court weighs them together.

Arguably, S. 3305 would meet the first, specificity requirement. One indication: the identity of the individual entity (British Petroleum) or class (responsible parties for offshore facilities generally) was easily ascertainable when the legislation was passed. We need not dwell on the specificity requirement, however, because it is likely – assuming Congress does not "evince a congressional intent to punish" in passing S. 3305 – that a court would find the bill not to satisfy the second, punitive requirement. First, monetary liability for the injuries one causes is not a type of punishment historically prohibited by the Bill of Attainder Clause. Second, S. 3305 can

reasonably be said to further a nonpunitive legislative purpose: attaching liability to the entity that caused the oil spill injury in lieu of the taxpayer. In language plainly relevant to the Deepwater Horizon spill, a court has noted: "[E]ven if the [law in question] singles out an individual on the basis of irreversible past conduct, if it furthers a nonpunitive legislative purpose, it is not a bill of attainder." *Seariver Maritime Financial Holdings, Inc. v. Mineta*, 309 F.3d 662, 674 (9th Cir. 2002). Thus, as long as the committee reports and floor debates on S. 3305 do not suggest punitive motive, the bill is unlikely to be deemed a bill of attainder. It would seem, as suggested above, that there are obvious candidates for nonpunitive purposes that Congress might put forward in the legislative history of S. 3305.

4. Impairment of Contracts Clause. The Supreme Court has held that the Impairment of Contracts Clause in the Constitution, by its terms applicable only to the states, does not apply to the federal government indirectly through the Fifth Amendment Due Process Clause. *Pension Benefit Guaranty Corp.*, 467 U.S. at 733. Therefore, this clause is no impediment to S. 3305.

5. Ex Post Facto Clause. This clause prohibits Congress from passing laws attaching new negative legal consequences to pre-enactment conduct. Since the early years of the nation, the Supreme Court has construed the clause to apply only to penal legislation. *Landgraf v. USI Film Products*, 511 U.S. 244, 266 n.19 (1994), *citing Calder v. Bull*, 3 Dall. 386, 390-391 (1798). By contrast, the OPA liability to which the $75 million cap and S. 3305 apply is civil, not criminal, liability. Thus, the Ex Post Facto Clause poses no obstacle to S. 3305.

Constitutionality of S. 3346's Retroactive Increase in OCSLA's Civil Penalty Cap, and Increase in OCSLA's Criminal Penalty Cap

While S. 3305 addresses compensatory liability, S. 3346 deals with penalties. S. 3346, titled the Outer Continental Shelf Lands Act Amendments Act of 2010, would increase both the civil and criminal penalty caps under the OCSLA. 43 U.S.C. §§ 1350(b) (civil), 1350(c) (criminal). Under the bill, a person (including corporations) not complying with, among other things, any OCSLA lease term or regulation would, after the allowed period for corrective action, be liable for a civil penalty up to $75,000 per day, rather than the current $20,000 per day. Noncompliance posing a serious threat of harm must result in a civil penalty up to $150,000 for each day of violation without regard to the corrective period, rather than the current discretionary civil penalty, which appears to adopt the $20,000 per day cap. These civil-penalty amendments take effect pre-enactment, S. 3346 specifies, on April 15, 2010, just as S. 3305 would. Finally, under the bill a person who knowingly and willfully commits an act falling into any of four categories must, upon conviction, be punished by a criminal fine of not more than $10 million, rather than the current $100,000. The bill states no effective date for this criminal-penalty amendment.

As for the increase in OCSLA's civil penalty caps effective April 15, it would seem that the constitutionality analysis of retroactivity generally tracks that above for a retroactive increase in OPA's compensatory liability caps – and with the same caveats. That is, a taking claim is still likely to founder because there is no property right to have the law remain unchanged, because the additional money paid in fines is a generalized monetary liability not recognized under emerging case law as a basis for takings claims, and because any lease/contract right to be immune from civil penalties above the statutory cap in effect when the lease was entered into more likely would base a possible breach of contract than a possible taking.

As for the increased criminal penalty cap, the Ex Post Facto Clause calls for added analysis. Because S. 3346 states no effective date for its increase in this cap, the normal presumption is that the increase would take effect as of date of enactment. "[A]bsent a clear direction by Congress to

the contrary, a law takes effect on the date of its enactment." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991). Nothing in the bill appears to meet this high "clear direction … to the contrary" standard, so it seems very likely that the normal presumption applies.

A date-of-enactment effective date for the proposed criminal-penalty increase eliminates the ex post facto infirmity that a pre-enactment date such as April 15 would fall victim to, should S. 3346 be applied to conduct between April 15 and date of enactment. (Indeed, the avoidance of this constitutional problem is another reason a court likely would adopt a date-of-enactment effective date.) As long as the conduct to which the increased criminal penalty attaches is conduct occurring after the date of enactment, there is no ex post facto issue. Note in this regard that a statute increasing a criminal penalty cap for conduct beginning before its enactment date, but which continued beyond that date, would likely not be held ex post facto as to the post-enactment-date conduct. *See, e.g.*, *United States v. Julian*, 427 F.3d 471, 482 (7th Cir. 2005). Thus, if hypothetically British Petroleum knowingly and willfully began to violate a lease term or OCSLA regulation before S. 3346's enactment, that likely would not preclude punishment up to the S. 3346-increased penalty cap for the continuation of that violation after enactment.